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IN THE

Supreme Court of the United States

October Term, 1967

No. 1407

CARL PERLA, SR.,
Petitioner,

v.

STATE OF NEW YORK and LOUIS J. LEFKOWITZ,
as Attorney General of the State of New York,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Reasons Why Writ Should be Denied

1. Petitioner is attempting to raise in this Court an alleged violation of due process which cannot be asserted for the first time in this Court.

The only Federal constitutional question raised by the petitioner in the State courts is an alleged violation of the provision against self-incrimination. No violation of due process was asserted or argued. (See Petitioner's Answer, ¶ "Eleventh"; R. p. 31.) The petitioner recognizes this fact by offering, as a rather lame excuse for its failure to raise the "due process" question, the fact that he had prevailed in both of the two lower State courts and was not

aggrieved until the Court of Appeals rendered a decision adverse to him.* This is not the fact. Both Special Term and the Appellate Division found the provision of the New York State Constitution to be valid, but held in his favor on the question of interpretation of the provision with regard to a distinction to be drawn between "officers" and "employees". The Court of Appeals found that, for the purposes of the provision involved, there was no distinction between the two terms. This question, however, is not before this Court.

In an attempt to circumvent this jurisdictional rule of exclusion, petitioner asserts that the Court of Appeals, on its own initiative, raised and disposed of the "due process" question. This, again, is not the fact. The Court's statement, in the concluding paragraph of its opinion (Petition, Appendix A, p. 19) that "There is no such inescapable conflict with the Fifth Amendment as to destroy the salutary mandate which the People of New York have written into their Constitution" must be read in the context of the opinion (pp. 18-19). It is clear that the Court of Appeals tested the State provision only under the self-incrimination provision of the Fifth Amendment. No mention was made or discussion had relating to the due process provision. Furthermore, the Court of Appeals made it clear that only two constitutional questions arise, neither of which included "due process". The Court said (Petition, Appendix A, p. 13):

> "Two constitutional questions arise. One under the New York Constitution, whether the parking fee collecting offices previously held by defendant until

* Actually, the petitioner was legally aggrieved when the summons and complaint in the action at bar were served upon him. It was incumbent upon him to set forth *all* matters of defense in his answer to the complaint.

> January, 1966 fall within the term 'public office' as it appears in Article I, section 6; the other under the Fifth Amendment of the United States Constitution, whether the compulsion exerted by forfeiture of office is a violation of defendant's protection against self-incrimination (*Spevack* v. *Klein*, 385 U. S. 514)."

This Court has held that its jurisdiction is conditioned upon there having been "an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws" (*Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U. S. 182, 185 [1945]; *Mazer* v. *Stein*, 347 U. S. 201, 206, n. 5 [1954]). The point does not, as it must, arise from the record (*Tyrrell* v. *District of Columbia*, 243 U. S. 1, 6 [1917]) and was not, as it should have been, urged or briefed below (*California* v. *Taylor*, 353 U. S. 553, 557, n. 2 [1957]; *Lawn* v. *United States*, 355 U. S. 339, 362, n. 16 [1958]).

2. In any event, petitioner has failed to demonstrate a violation of due process.

Petitioner asserts that the failure to conduct an administrative hearing prior to the commencement of this ouster proceeding constitutes a violation of due process. He relies completely on this Court's decision in *Slochower* v. *Board of Education*, 350 U. S. 551 (1956).

However, *Slochower* is totally unlike the case at bar. In the cited case this Court said (p. 554):

> "Slochower had 27 years' experience as a college teacher and was *entitled to tenure* under state law. McKinney's New York Laws, Education Law, § 6206(2). Under this statute, appellant may be discharged *only for cause*, and after notice, hearing, and appeal. § 6206(10)." (Emphasis added.)

In the case at bar, on the other hand, the petitioner had been Commissioner of Street Sanitation of the City of

Buffalo for only 2½ months at the time he was subpoenaed to appear before the Grand Jury. Furthermore, he had no tenure whatsoever since he was subject to removal by the Mayor of the City of Buffalo, at the latter's pleasure. The Charter of the City of Buffalo, Article 15, § 291 reads as follows:

> "The mayor shall appoint, subject to confirmation by the council, *and may at pleasure remove* the commissioner of street sanitation." (Emphasis added.)

3. The provision of the New York State Constitution (Art. I § 6) for forfeiture of office and disqualification from future governmental employment for a period of five years does not violate the privilege of self-incrimination under the Fifth Amendment of the Federal Constitution.

It has been held that the Fifth Amendment, although it permits the privilege of refusing to testify on the basis of self-incrimination, does not guarantee that the person invoking the privilege shall be continued in his employment (*United Electrical R. & M. Workers of America* v. *General Electric Co.*, 127 F. Supp. 934, 941-2 [D. C., Dist. of Col., 1954]). This principle has been applied to governmental employees (*Canteline* v. *Mc Lellan*, 282 N. Y. 166, 170-1 [1940]; *Steinmetz* v. *California State Board of Education*, 44 Cal. 2d 816, 285 P. 2d 617, 621-2 [1955], cert. den. 351 U. S. 915 [1956]; *Christal* v. *Police Commission of City and County of San Francisco*, 33 Cal. App. 2d 564, 92 P. 2d 416, 419 [1939]).

The expressions of the Justices of this Court in *Garrity* v. *State of New Jersey*, 385 U. S. 493 (1967) and *Spevack* v. *Klein*, 385 U. S. 511 (1967) indicate that the validity of the sanctions provision of the New York State Constitution is unquestioned.

The cited cases are authority for the proposition that a statement obtained from a witness before a grand jury under a waiver of immunity executed by a public officer or employee, in compliance with the provisions of Article I, Section 6, of the State Constitution may not be used against the person making the statement on the ground that the statement is involuntary as a matter of law.

The question of the validity of the sanction of loss of job as a result of refusal to waive immunity was not involved. A majority of the Court—Justices CLARK, FORTAS, HARLAN, STEWART and WHITE, indicated affirmatively that, if the question arose, they would rule that the officers must waive immunity and testify or face discharge.

Mr. Justice HARLAN (joined by Mr. Justice CLARK and Mr. Justice STEWART) dissented in the *Garrity* case. He said (385 U. S., at pp. 507-9):

> "[N]othing in the logic or purposes of the privilege demands that all consequences which may result from a witness' silence be forbidden merely because that silence is privileged. The validity of a consequence depends both upon the hazards, if any, it presents to the integrity of the privilege and upon the urgency of the public interests it is designed to protect.
>
> "* * * It must be concluded, therefore, that the sanction at issue here is reasonably calculated to serve the most basic interests of the citizens of New Jersey.
>
> "* * * [F]rom our vantage point, it would be quite improper to assume that New Jersey will employ these procedures for purposes other than to assess in good faith an employee's continued fitness for public employment. * * * The majority's broad prohibition * * * extends the scope of the privilege beyond its essential purposes, and seriously hampers the protection of other important values. As the majority's prohibition is applied in this case, it seems implicit in it, despite the majority's disclaimer, that it would entirely

forbid a sanction which presents, at least on its face, no hazard to the purposes of the constitutional privilege, and which may reasonably be expected to serve important public interests. We are not entitled to assume that discharges will be used either to vindicate impermissible inferences of guilt or to penalize privileged silence, but must instead presume that this procedure is only intended and will only be used to establish and enforce standards of conduct for public employees. As such, it does not minimize or endanger the petitioners' constitutional privilege against self-incrimination.

"*I would therefore conclude that the sanction provided by the State is constitutionally permissible.*" (Emphasis added.)

In support of the italicized statement above, Mr. Justice HARLAN appended the following note to his opinion (385 U. S., at p. 509):

"The late Judge JEROME FRANK thus once noted, in the course of a spirited defense of the privilege, that it would be entirely permissible to discharge police officers who decline, on grounds of the privilege, to disclose information pertinent to their public responsibilities. Judge FRANK quoted the following with approval:

"'*Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers.* They claim that they had a constitutional right to refuse to answer under the circumstances, but * * * *they had no constitutional right to remain police officers* in the face of their clear violation of the duty imposed upon them. *Christal* v. *Police Commissioner of San Francisco.*' Citing 33 Cal. App. 2d 564, 92 P. 2d 419. (Emphasis added by Judge FRANK.) *United States* v. *Field*, 193 F. 2d 92, 105-6."

Mr. Justice WHITE, dissenting in both *Garrity* and *Spevack*, said (385 U. S., at p. 532):

> "The majority does not deny that the State and its citizens have a legitimate interest in ridding themselves of faithless officers. Admittedly, however, in attempting to determine the present qualifications of an employee by consultation with the employee himself, the State may ask for information which, if given, would not only result in a discharge but would be very useful evidence in a criminal proceeding. *Garrity*, in my view, protects against the latter possibility. Consequently, I see no reason for refusing to permit the State to pursue its other valid interest and to discharge an employee who refuses to cooperate in the State's effort to determine his qualifications for continued employment."

Mr. Justice FORTAS, concurring in the *Spevack* case, said (385 U. S., at p. 519):

> "This Court has never held * * * *that a policeman* may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer. It is quite a different matter if the State seeks to use the testimony given under this lash in a subsequent criminal proceeding. *Garrity* v. *New Jersey*, * * *."

It is quite evident from the foregoing that a majority of at least five justices of this Court have upheld the validity of the sanction of discharge from public employment. Indeed, there is nothing in the majority opinion in *Garrity* to indicate a contrary result. As a matter of fact, an inference may be drawn in support of the validity of the sanction. In commenting upon Mr. Justice HOLMES' statement in *McAuliffe* v. *New Bedford*, 155 Mass. 216, 29 N. E. 517 (1892), to the effect that "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman", quoted at 385 U. S., p. 499, Mr. Justice DOUGLAS, speaking for the majority, said:

> "The question in this case, however, is not cognizable in those terms."

Indeed, Mr. Justice DOUGLAS stated that the question was not reached (385 U. S., at p. 516, n. 3).

CONCLUSION

For the above reasons the writ of certiorari sought by the petitioner should be denied.

Dated: May 17, 1968.

Respectfully submitted,

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